

FOR THE DISTRICT OF NEBRASKA

BILLY TYLER,)	
)	4:04cv3391
Petitioner,)	
)	MEMORANDUM AND ORDER
vs.)	(appeal)
)	
ROBERT HOUSTON,)	
)	
Respondent.)	

This matter is before the court on filing no. 41, the Notice of Appeal filed by the petitioner, Billy Tyler, a prisoner who attempts to bring an interlocutory appeal from filing no. 40, the Memorandum and Order in which I denied various nondispositive motions. Also before the court is filing no. 42, a Memorandum from the Clerk of Court inquiring whether the petitioner may proceed in forma pauperis ("IFP") on appeal.

28 U.S.C. § 1915(a)(3) states: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." See also Fed. R. App. P. 24(a)(3). Upon consideration of the record in this action, I find that the petitioner's interlocutory appeal is not taken in good faith. In fact, the petitioner has not complied with Fed. R. App. P. 5 governing an appeal by permission. Therefore, leave to proceed IFP on appeal is denied.

The petitioner may file a motion pursuant to Fed. R. App. P. 24(a)(5) with the Eighth Circuit Court of Appeals and request leave to proceed IFP on appeal. Fed. R. App. P. 24(a)(5) states:

(5) Motion in the Court of Appeals. A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party

must include the affidavit prescribed by Rule 24(a)(1).

It is doubtful that a "Certificate of Appealability" is required for an interlocutory appeal in a habeas corpus case. In the remote event that one is required for this appeal, a Certificate of Appealability is denied. The petitioner has failed to demonstrate that reasonable jurists would find this court's ruling (filing no. 40) debatable or wrong.

THEREFORE, IT IS ORDERED:

1. That leave to proceed IFP on appeal is denied;
2. That, pursuant to 28 U.S.C. § 1915(a)(3) and Fed. R. App. P. 24(a)(4), the Clerk of Court shall send a copy of this Memorandum and Order to the parties and the Eighth Circuit Court of Appeals as notice that the petitioner has been denied IFP status on appeal, and that his appeal has been determined not to be in good faith;
3. That, pursuant to Fed. R. App. P. 24(a)(5), the petitioner has 30 days, after service of this Memorandum and Order, to file a motion with the Eighth Circuit Court of Appeals for leave to proceed IFP on appeal; and
4. That a Certificate of Appealability, if applicable, is denied.

December 7, 2005.

BY THE COURT:

/s Richard G. Kopf
United States District Judge